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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of

Nondiscrimination in the Distribution of
Interactive Television Services Over Cable

CS Docket No. 01-7

To: The Commission

COMMENTS OF CHARTER COMMUNICATIONS, INC.

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Pursuant to the Commission's of Notice of Inquiry ("NOI") in the above captioned matter, Charter Communications Inc. ("Charter")¹ submits the following comments regarding the distribution of Interactive Television ("ITV") over cable television systems.

I. INTRODUCTION AND SUMMARY

In these Comments, Charter undertakes the unique and somewhat difficult task of responding to an NOI that raises questions regarding *potential* problems that *could* arise *if* one *possible* scenario for the future development and deployment of ITV technology and services *should* occur.² Charter will attempt, however, to provide the Commission with useful comments as to why it is premature for the Commission to consider access regulations applicable to ITV

¹ Charter is a multiple system cable operator serving approximately 6.4 million subscribers in 40 states.

² The NOI's discussion of a new ITV regulatory overlay has both the feel and appearance of constructing a heavy regulatory roof on top of a house of hypothetical cards made up of multi-tiered "ifs" and unsupported assumptions. The third sentence of the NOI reads: "**If** it turns out that only one delivery platform in each geographic area has the capability to provide the most attractive ITV services package, **and if** the platform provider is vertically integrated with an ITV service provider, then there would be the **potential** for anticompetitive behavior." NOI at ¶ 1 (emphasis added).

services over cable television systems, and as to why the Commission should instead promote facilities-based competition as a preferred communications policy. Charter will also comment upon the NOI's unfounded and dangerous presumption that cable systems operate as common carrier "platforms." Finally, Charter will address the absence of Commission jurisdiction to impose ITV access obligations on cable systems.

II. ITV REGULATION WOULD BE PREMATURE

The most relevant and insightful passage in the NOI is found at paragraph 6: "The nature of ITV services is evolving rapidly, with constant and continuous technological changes and evolving business models, making it difficult to specify a definition." In this single sentence, the NOI accurately reflects the early developmental status of ITV technology, business models and services. Like the rest of the cable television industry, Charter is in the process of testing various ITV technologies and service applications to determine which have the potential for a realistic business model. At the same time, Charter recognizes that each cable system must develop the capability to reasonably coordinate and manage the various ITV technologies, functions and services.

The experimental nature of ITV services, both in terms of technology and service proposals is chronicled almost daily in the press. In a recent article describing the findings of a panel of ITV business experts, it was predicted that profitability for ITV services is still several years away. As one analyst described, "right now it's not a business, it's an expense."³ Another recent article focusing on the deployment of ITV services over cable systems observed, "In other

³ *Experts Say Interactive TV Profits Are Still Years Away*, Communications Daily, March 1, 2001, at 8.

words, uncertainty rules in ITV land, and Wall Street is always uncomfortable in that territory.”⁴ Other articles have detailed the difficulty the cable industry faces in funneling sufficient resources into ITV services at a time when both the technology and profitability are so uncertain.⁵ In one article, vendors of ITV technology voiced concerns that this NOI could potentially slow investment and deployment of ITV facilities and services.⁶ In that article, the President of ITV equipment vendor Integra 5, stated, “We took a beating in this industry over the open access stuff. [The cable modem] market hasn’t gotten off the ground. Maybe if they stay out of interactive TV long enough, we can get a business up and running.”⁷ In that same article, the CEO of Wink Communications stated that government imposed standards can create “a series of compromises” that “have a tendency to slow things down.”⁸

It is ironic that this new, developing service and technology could be stifled by the NOI. As Commissioner Furchtgott-Roth stated regarding the NOI,

[w]hile the item is framed as a Notice of Inquiry (“Notice”), it is no less damaging to raise the specter of government regulation, at this point in time, for services that are still in their gestational period. Also, by the mere adoption of this item, the Commission communicates to the public that something has gone awry in the marketplace introduction of cable interactive services—something serious enough to warrant government intervention. This simply is not the case and there is no objective evidence to prove otherwise.⁹

⁴ *Waiting Out The Backlash*, Cable World, February 19, 2001, at 16.

⁵ *See, e.g., Cable's Growth Engine Misfiring*, Electronic Media, February 26, 2001, at 23.

⁶ *Vendors Weary Of ITV Inquiry*, Multichannel News, February 26, 2001, at 1, 62.

⁷ *Id.* at 62.

⁸ *Id.* at 62.

⁹ NOI at Dissenting Statement of Commissioner Harold W. Furchtgott-Roth.

Chairman Powell has also spoken to the issue of premature regulatory involvement in a developing technology. In his separate statement in the AOL/Time Warner transfer proceeding, then Commissioner Powell stated:

I am concerned that in new and innovative markets, the government will be too easily seduced to intervene prematurely, given the initial excitement and promise (if not hype) of innovative offerings, the rapid pace of change in the market, and competitors natural anxiety (if not panic).

.....

The concern with premature intervention is also great where viable business models are still being explored. The internet is a wonderful space, but producers are still struggling mightily to find services and approaches that will allow them to prosper. I am concerned about the government labeling aspects of market activity as anticompetitive before we even have a fix on the elements of a viable business. Notions such as proprietary assets and exclusivity can surely rise to anticompetitive levels, but they also are often the keys to profitability and viable business that allow producers to serve consumers effectively.¹⁰

Chairman Powell's statement in the AOL/Time Warner transfer proceeding is likewise applicable to the Commission's current NOI on ITV. Cable operators seeking to deploy ITV services have not yet established the technology, the business model or the services that will be deployed. As recognized by Chairman Powell, the cable industry needs the time to experiment, deploy and hopefully establish a successful business model. Any proposal of regulatory intervention at this time will only delay that outcome.

III. THE NOI DISCOURAGES FACILITIES-BASED COMPETITION

The ITV mandatory nondiscriminatory access proposal advanced in the NOI is at odds with the Commission's preferred policy of promoting facilities-based competition. If the

¹⁰ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, FCC 01-12, Statement of Commissioner Michael K. Powell, Concurring In Part and Dissenting In Part at 14-15 (rel. Jan. 22, 2001).

Commission were to treat cable system deployment of ITV services as a common carrier function, such regulation would discourage ITV investment and deployment by both the cable industry and providers of competing facilities.

Both the Commission and Congress have long recognized that facilities-based competition is preferable to intrusive access regulation of a single provider's facilities.¹¹ For example, in implementing its Open Video System regulations, the Commission "sought to encourage competing, in-region cable operators to develop and upgrade their own systems, rather than occupy capacity on a competing open video system that could be used by another programming provider, and thereby to promote facilities-based competition."¹² Similarly, in considering the imposition of open/forced ISP access obligations upon cable operators, the Commission has consistently and thoroughly reviewed the development of and incentives for alternative facilities-based competition.¹³

In the late 1960's and early 1970's, the Commission encouraged the development of independent cable facilities as facilities-based competitors, particularly in light of their potential to introduce broadband services:

¹¹ H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 93 (1992) ("The Commission shall encourage arrangements which promote the development of new technology providing facilities-based competition to cable..."); S. Rep. 104-230 at 174 (1996) ("the conferees agreed, in general, to take the most restrictive provisions of both the Senate bill and the House amendment in order to maximize competition between local exchange carriers and cable operators within local markets").

¹² *Time Warner Cable v. RCN Telecom Services of New York, Inc.*, 15 FCC Rcd. 1124, ¶ 10 (2000).

¹³ See, e.g. *Application for Consent to the Transfer of Control of Licenses from Media One Group, Inc. to AT&T Corp.* Memorandum Opinion and Order, 15 FCC Rcd. 9816, at ¶¶ 117-119 (2000).

there is substantial expectation that broadband cables, in addition to CATV services, will make economically and technically possible a wide variety of new and different services involving the distribution of data, information storage and retrieval, and visual, facsimile and telemetry transmission of all kinds.¹⁴

Congress reiterated the Commission's policy of supporting facilities-based competitive development in the legislative history of the 1984 Cable Act.¹⁵ That multi-facility policy vision of the Commission and Congress has animated investments and regulations for 30 years.¹⁶

The Commission's preference for facilities-based competition has paid off in many respects.¹⁷ In the context of ITV services, for example, direct broadcast satellite (DBS) providers have taken a significant lead over the cable industry in the deployment of interactive video-on-demand services.¹⁸ Indeed, recent developments in satellite return path transmission capacity may well keep DBS providers at the forefront of all ITV services.¹⁹ Given the

¹⁴ *Applications of Telephone Companies for Section 214 Certificates For Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 FCC 2d 307, 324-25 (1970); see also *Petition by Manatee Cablevision, Inc.*, 22 FCC. 2d 841, 861 (1970).

¹⁵ See, e.g., H.R. Rep. No. 98-934 at 27 (1984) (discussing competitive benefits of development of two-way capability of cable systems).

¹⁶ See H.R. Rep. No. 98-934 at 28 (recognizing that investment in deployment of cable facilities faces significant risk).

¹⁷ For example, the Commission's policies have lead to the development of multiple facilities-based providers of high speed Internet access services, including DSL, satellite, and wireless. See, e.g., Wayne Kawamoto, *DSL Gains On Cable Modem*, <http://www.clec-plant.com/news/index.html>, March 14, 2001 (reporting that DSL now has 39% of high speed market, and cable 51%); *Annual Assessment of the Status of Competition the Market for the Delivery of Video Programming*, Seventh Annual Report, FCC 01-1, ¶¶ 78-79 (rel. Jan. 8, 2001) ("*Seventh Annual Competition Report*").

¹⁸ For example, DirecTV provides Wink interactive services to 1.5 million satellite homes, which is more than twice the number of homes Wink reaches through U.S. cable systems. *Wink Eyes 6 Mil. Homes: Investors Drub Stock*, Kagan Broadband, Feb. 1, 2001.

¹⁹ See, e.g., *Seventh Annual Competition Report*, at ¶¶ 78-79 (discussing introduction of high-speed return path connections by EchoStar and DirecTV in 2001).

developmental stage of cable industry ITV service deployment, it is impossible to predict either if cable will turn out to be the most successful distributor of ITV services or if any marketplace failure would result from that success. But it is clear that absent facilities-based competition, some ITV advancements may not have occurred, and if facilities-based competition is abandoned, future advancements may be delayed or thwarted altogether.

As the Commission has previously recognized in consideration of open/forced ISP access obligations, promulgating and implementing nondiscriminatory mandatory access requirements for cable systems would be a complex, costly and cumbersome regulatory undertaking. Given all of the uncertainties surrounding ITV services, the potential for unintended regulatory consequences is truly mind numbing. The ITV marketplace needs encouragement not regulation. This will allow cable operators to develop and deploy ITV services and will incent the development of facilities-based competition for ITV as well as other services.

IV. CABLE SYSTEMS ARE NOT COMMON CARRIER PLATFORMS

The NOI proceeds from a novel and unsupported assumption that the Commission should now treat cable systems as common carrier systems. Under the NOI's new terminology, the Commission is no longer regulating a cable system, but instead a "cable platform"²⁰ or a "video pipeline."²¹ The NOI apparently seeks to extend this new premise even beyond ITV. In the NOI, the Commission goes so far as to request comment on nondiscrimination rules for access to the "video pipeline" for all "content providers", not just ITV providers:

²⁰ NOI at ¶ 21.

²¹ *See, e.g.*, NOI at ¶¶ 11 (NOI will refer to video transmission streams of cable system as the "video pipeline"), 26 (noting that ITV providers may need access to the cable operator's "video pipeline"), 30 (seeking comment on nondiscrimination rules for access to the "video pipeline of a cable operator").

In summary then, we seek comment on possible scenarios for nondiscrimination rules, including the extent of, and the terms and conditions for, access by unaffiliated content providers to the video pipeline of a cable operator. Commentors should also address the question of how to decide on the amount of cable video capacity to be reserved for unaffiliated content providers pursuant to a nondiscrimination rule (in particular, whether must carry, leased access, and channel occupancy rules set aside sufficient capacity) and how it should be divided among those unaffiliated providers.²²

The legal ramifications of this NOI proposal are described in the next section. However, there are serious technology, deployment and investment considerations that the NOI does not address in its discussion of nondiscriminatory forced ITV access requirements.

Most importantly, the NOI fails to recognize that cable systems have not been, and are not now, designed, built, or provisioned for ubiquitous multi-party use. Cable systems are not telephone systems. Cable systems are designed, built and provisioned with a shared bandwidth and a “tree and branch” architecture. The cable system architecture does not have individual customer dedicated lines or ubiquitous transmission routing as is found in telephone systems. As a result, the programming and data routed over a cable system’s shared bandwidth must be carefully managed to insure adequate capacity and proper routing for both upstream and downstream transmissions. Recent articles have raised questions as to whether the cable television distribution system is sufficiently “robust” to support all necessary ITV functions.²³

The CEO and Chairman of ICTV, Robert Classen, made the following observation:

Interactivity will require the sending of return signals, whether for VOD, cable modems or IP telephony. Cable operators will need to know how much capacity to allocate for return path. The cable guys are learning this by trial and error.²⁴

²² NOI at ¶ 30.

²³ See, e.g., *Technology and Market Questions Dominate at ITV Conference*, Communications Daily, March 2, 2001 at 6; *Interactive Television*, Broadcasting and Cable, July 10, 2000, at 22.

²⁴ Broadcasting and Cable, July 10, 2000 at page 32.

Because Charter's cable systems, like the rest of the cable industry, do not have dedicated lines for individual subscribers, the issues surrounding allocation and management of appropriate upstream and downstream capacity are critical and unresolved in the context of ITV services.

Notwithstanding the NOI's novel "video pipeline" regulatory paradigm, it must be remembered that Charter and the rest of the cable industry invested billions of dollars over the past several years in building and rebuilding cable systems based upon the Communications Act's Title VI regulatory framework for **cable systems**, not video pipelines. The NOI's far reaching common carrier-based regulatory proposals do not match the architecture or technology of cable systems built pursuant to the Title VI regulation established by Congress, and such proposals would produce disastrous consequences for cable industry deployment of new services.

V. THE REGULATORY APPROACH OF THE NOI IS INCONSISTENT WITH THE COMMUNICATIONS ACT AND FIRST AMENDMENT

As noted, the Commission's NOI proceeds from the fatally flawed premise that cable systems can be regulated as common carrier "pipelines," open for access by anyone on a nondiscriminatory basis. The Commission's premise and approach in the NOI is inconsistent with both the Communications Act and the First Amendment.²⁵

The regulatory principle set forth by Congress in the Communications Act is that cable operators are *not* common carriers and their systems are not generally open to all comers.²⁶ As recognized by Congress and the courts, cable operators are First Amendment speakers who

²⁵ The Commission's assertion that it is "not seeking comment on mandatory access to cable capacity for ITV service providers" (NOI at ¶ 21) is not supportable. A "nondiscrimination rule" triggered by the offering of any affiliated ITV services is effectively a mandatory access rule.

²⁶ *See, e.g.*, 47 U.S.C. § 541(c).

exercise substantial editorial discretion in deciding what content to carry on their systems and what content not to carry. For example, in Section 621(c), the Communications Act provides that a “cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”²⁷ Similarly, Section 624(f) prohibits “any Federal agency, State, or franchising authority” from “impos[ing] requirements regarding the provision or content of cable services, except as expressly provided in this title.”²⁸ Those provisions reflect the Congressional assumption that cable operators and cable systems are not generally open for access, and do not generally have to offer capacity for use on a nondiscriminatory basis.

The Supreme Court also has recognized that cable operators are generally empowered to control the content and capacity of their systems. It has found that “cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include,”²⁹ and “both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide.”³⁰ Moreover, the Court has stated that “There can be no disagreement on [that] initial premise. . . . Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable . . . operators ‘seek to communicate messages on a wide variety of topics and in a wide variety of formats.’”³¹

²⁷ 47 U.S.C. § 541(c).

²⁸ 47 U.S.C. § 544(f)(1).

²⁹ *Federal Communications Comm’n v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979).

³⁰ *Id.* (quoting *Report and Order*, Docket No. 20829, 43 Fed. Reg. 53742, 53746 (1978)).

³¹ *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (quoting *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)).

The *only* exceptions to the general rule are very specific, and were created by Congress, not the Commission. In the NOI, the Commission discusses some regulations that dictate cable operators' programming options, but the point is still the same – the regulations were specific and mandated by Congress, as the Commission recognizes:

Pursuant to statute, the Commission has adopted various rules addressing the conduct of cable operators vis-à-vis unaffiliated video programming networks, based on the finding that cable operators have market power in the local MVPD market. Moreover, the Commission's *statutorily mandated* program access regulations generally apply to vertically-integrated cable video programming networks. . . . We seek comment on whether it is appropriate to apply to ITV service provision the same reasoning used *by Congress* to establish regulations. . . .³²

There are other specific exceptions to the general prohibition on mandating access cable systems – **all of them created by Congress.**³³ Those exceptions, however, are not a basis upon which the Commission may act to require mandatory access to cable systems. Rather, they emphasize that only Congress may create narrow exceptions to the general prohibition on treating cable operators as, common carriers.

Moreover, they emphasize that for Congress to act Constitutionally, it may infringe only upon cable operators' editorial control where there is "substantial evidence"³⁴ of a "substantial

³² NOI at ¶ 21 (emphasis added) (internal citations omitted). As discussed below, the Commission's rules requiring cable operators to devote 60% of their first 75 channels to unaffiliated programming were recently struck down by the D.C. Circuit, on Constitutional and statutory grounds.

³³ Section 611 allows local franchising authorities certain power to establish requirements for public, educational, and governmental ("PEG") channels. 47 U.S.C. § 531(a). Section 612 requires operators to designate channel capacity for commercial leased access under certain circumstances. 47 U.S.C. § 532(b). And Sections 614 and 615 require carriage of certain broadcast and noncommercial educational television stations under certain circumstances. 47 U.S.C. §§ 534, 535.

³⁴ *Turner*, 512 U.S. at 666.

government interest that would be achieved less effectively absent the regulation.”³⁵ In comparison to Congressionally crafted exceptions, such as must carry or commercial leased access, where there were, at least arguably, mature markets and developed facts, there is no developed market and no evidence demonstrating the need for any ITV regulation.

The absence of concrete evidence is fatal. In *Time Warner Entertainment Co., L.P. v. FCC*, 2001 U.S. App. LEXIS 3102 (D.C. Cir. Mar. 2, 2001) (“*Time Warner II*”), the court struck down the Commission’s rules dictating that cable operators carry a certain number of unaffiliated programmers and limiting the number of subscribers that a cable operator could serve. In so doing, the court focused on the lack of a factual basis for the Commission’s rules, and the Commission’s reliance on pure speculation regarding anticompetitive activities and harm, even though the Commission was expressly directed by Congress to act. As the court made clear, the Commission cannot limit a cable operator’s right to control cable system services and distribution based on a purely conjectural risk of anticompetitive behavior. Yet, in this NOI proceeding, not only is the potential anticompetitive behavior purely conjectural, the precise parameters of the service to be regulated are purely conjectural. If the Commission’s cable ownership rules in *Time Warner II* failed to meet First Amendment scrutiny, then any regulation of ITV at this time would fail spectacularly.

Ultimately, the Commission seeks comment on the legal classification of ITV under the definitions of the Communications Act.³⁶ As a threshold matter, Charter believes it is impossible for the Commission to identify what legal definition (“cable service” or “information service”)

³⁵ *Id.* at 662.

³⁶ NOI at ¶ 44.

applies when no one, including the Commission, can definitively say what ITV is or will be.³⁷ It does appear at the present, however, that ITV shares all of the characteristics of a cable service.

It does not appear, however, that ITV services share the characteristics of “telecommunications services.” Telecommunications service must involve “the offering of telecommunications [(the transmission, between or among points specified by the user, of information of the users choosing without change in the form or content of the information as sent and received)] for a fee directly to the public. . . .”³⁸ As it stands today, ITV does not allow subscribers to transmit unaltered information to and from points of their choosing. Rather, it appears that ITV will primarily involve choices by subscribers from pre-selected pools of content. And while there may be some element of “telecommunications” involved in the provision of ITV, that does not render it a telecommunications service. At some basic level, all cable services could be viewed as having a component of telecommunications in them. Operators offer their services to all potential subscribers. And there is a transmission element, at a fundamental level, as a cable system provides transport between the points of the subscribers’ choosing (*i.e.*, from their home to various content sources, such as pay-per-view movies). Yet, Congress has clearly held that cable operators providing cable services are not common carrier telecommunications service providers. While ITV, like other cable programming services, may entail an element of “telecommunications,” there is no offering of a separate “telecommunications service” that would trigger the common carrier obligations considered by the NOI.

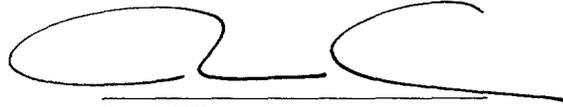
³⁷ See NOI at ¶ 6 (“The nature of ITV services is evolving rapidly, with constant and continuous technological changes and evolving business models making it difficult to specify a definition”).

³⁸ 47 U.S.C. § 152(46).

VI. CONCLUSION

Based on the foregoing, the Commission should take no further action on the NOI.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. Glist', written over a horizontal line.

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March 19, 2001

CERTIFICATE OF SERVICE

I, Glendora Williams, hereby certify that I have this 19th day of March, 2001, caused a copy of the foregoing Comments of Charter Communications, Inc. to be delivered by courier to the following:

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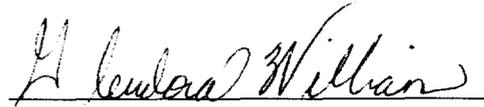
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